

# ICN QUESTIONS: REFUSALS TO DEAL

## Response from the Commerce Commission, New Zealand

4 November 2009

**Scope of response:** In accordance with the request from the ICN, the Commerce Commission's response below refers only to unilateral refusals to deal by persons and firms that have a substantial degree of market power. For completeness, it should be noted that refusals to deal also may infringe other provisions of the applicable New Zealand statute, the Commerce Act 1986, through collective behaviour that substantially lessens competition (section 27), collective boycotts (section 29), and resale price maintenance arrangements (sections 37 and 38).

### GENERAL LEGAL FRAMEWORK

- 1. Does your jurisdiction recognize a refusal to deal as a possible violation of your antitrust law? If so, is the term refusal to deal used in a manner different from the definition in the introductory paragraphs above? Please explain.*

Yes, a refusal to deal may be a breach of New Zealand's competition statute, the Commerce Act 1986 (the Commerce Act).

The nature of possible breaches is in line with the definition in the introductory paragraphs of the ICN memorandum.

- 2. Please state the statutory provisions or legal basis (including any relevant guidelines or formal guidance) for your agency to address a refusal to deal. Are there separate provisions for specific forms of refusal (e.g., IP licensing, essential facilities, margin squeeze)?*

In relation to the conduct of firms with a substantial degree of market power the Commerce Act does not refer specifically to refusals to deal and there are no separate provisions on specific forms of refusal. However, refusals to deal by firms with a substantial degree of market power may constitute conduct that is a breach of section 36 of the Commerce Act. Section 36(2) provides that:

“A person that has a substantial degree of power in a market must not take advantage of that power for the purpose of –

- (a) restricting the entry of a person into that or any other market; or
- (b) preventing or deterring a person from engaging in competitive conduct in that or any other market; or

(c) eliminating a person from that or any other market.”

The available remedies that are within the Commerce Commission’s direct control are:

- (a) to issue a warning to the company concerned;
- (b) to negotiate a formal settlement with the company about its future conduct;
- (c) to issue a cease and desist order.

Remedies that may be applied by the High Court, on the application of the Commerce Commission (the Commission), are:

- (a) pecuniary penalties on individuals and bodies corporate;
- (b) injunctions.

Where any person has suffered loss or damage for conduct that breaches s 36 of the Commerce Act damages may be awarded by the High Court, and the Court may also impose an injunction.

There are no current guidelines on refusals to deal. However, as noted under question 22 below, the Commission has commenced preparing guidelines on s 36 of the Commerce Act. It is intended that one section of these guidelines will cover refusals to deal.

***3. Do the relevant provisions apply only to dominant firms or also to other firms?***

As noted in the response to question 2 above, the broad prohibition in s 36 of the Commerce Act, which may apply to prohibit certain refusals to deal, applies only to firms with a substantial degree of market power.

***4. Is a refusal to deal a civil/administrative and/or a criminal violation? If it is a criminal violation, does this apply to all forms of refusal to deal?***

Refusals to deal that may amount to a breach of the Commerce Act can only be proceeded against civilly.

## **EXPERIENCE**

***5. How many in-depth investigations (i.e., beyond a preliminary review) of a refusal to deal has your agency conducted during the past ten years (or use a different time frame if your records do not go back ten years)?***

In the past ten years the Commission has undertaken at least 32 in-depth investigations of conduct that could be classified as unconditional or constructive refusals to deal. One investigation is in progress.

Only three of the 32 investigations related to unconditional refusals to supply, while fifteen concerned access terms. The remainder concerned other types of constructive refusals to deal.

Some investigations involved consideration of more than one type of alleged breach of section 36 of the Commerce Act by the same company.

6. *In how many refusal to deal cases did your agency find unlawful conduct during the past ten years? Please provide the number of cases concerning IP-licensing, essential facilities, margin squeeze, and all other types separately. For any case, in which your agency found unlawful behavior, please describe the anticompetitive effect and the circumstances that led to the finding.*

*For administrative systems -- i.e., the agency issues its own decision (subject to judicial review) on the legality of the conduct -- please state the number of agency decisions finding a violation, or settlements that were challenged in court and, of those, the number upheld and overturned. For judicial systems -- i.e., the agency challenges the conduct in court -- state the number of cases your agency has brought that resulted in a final court decision that the conduct violates the competition law or a settlement that includes relief.*

*Please state whether any of these cases were brought using criminal antitrust authority.*

*Please provide a short English summary of the leading refusal to deal cases (including IP licensing, essential facility, and margin squeeze) in your jurisdiction, and, if available, a link to the English translation, an executive summary, or press release.*

The Commission concluded that s 36 appeared to have been breached in four of the 32 cases in which in-depth investigations were undertaken. These involved:

Unconditional refusals to deal	2
Price/margin squeeze	1
Access pricing	1

Two of these four investigations resulted in civil proceedings in the High Court, one led to the issue of a cease and desist order by the Commission, while the other concluded with the issue of a formal warning by the Commission to the company concerned. The anticompetitive effect and the circumstances of each of these four cases is summarised below.

*(i) Unconditional refusal to deal*

One of the two litigated cases<sup>1</sup> involved a district electricity retailer, Bay of Plenty Electricity Ltd (BOPE), that effectively denied access by competing electricity retailers to the electricity meters that BOPE owned and that were used to measure the units of electricity used by consumers. The Commission concluded that BOPE had used its dominant position in the metering services market for the purpose of preventing or deterring other electricity retailers from engaging in competitive conduct in the electricity retailing market. The Commission commenced litigation in the High Court. The Court held that BOPE was not dominant and did not have a substantial degree of market power. The Commission did not appeal this decision. The High Court's decision is unreported.

<sup>1</sup> *Commerce Commission v Bay of Plenty Electricity Ltd* (unreported, High Court, Wellington, 13 December 2007).

In the other unconditional refusal to deal case, a provincial port company, Northport Ltd, was preventing another cargo handler provider from competing in the supply of general cargo marshalling services with the incumbent sole supplier, Northport Services Limited, Northport's own affiliated provider. The Commission concluded that Northport had taken advantage of a substantial degree of market power in respect of certain port services with an anti-competitive purpose of preventing a competing cargo handler providing marshalling services. The Commission sought, and by consent with Northport Ltd obtained, a cease and desist order requiring Northport Ltd to allow competition to occur in general marshalling services at the port. A link to the Commission's press release/decision can be found at: [www.comcom.govt.nz](http://www.comcom.govt.nz) under 'Media Centre'.

*(ii) Price/Margin squeeze*

This case involved the actions of a credit reporting and debt collection company, Baycorp Advantage Holdings (NZ) Ltd. Baycorp introduced a fee for each piece of credit default information loaded into its credit default database by competing debt collectors. The result was that independent debt collectors were unable or unwilling to load default information, and this had some effect on their ability to compete with Baycorp. The Commission concluded that Baycorp had taken advantage of its substantial degree of power in the credit reporting market to deter competitive conduct in the debt collection market. As Baycorp ceased the conduct, thereby limiting the detriment, the Commission concluded the case by issuing a formal warning to the company.

A link to the Commission's media release on the Baycorp case can be found at: [www.comcom.govt.nz](http://www.comcom.govt.nz) under 'Media Centre'.

Elements of a margin squeeze were also present in the *Telecom* 'data tails' case, described immediately below, in that wholesale prices set by dominant vertically integrated data transmission services provider, Telecom, were often higher than the retail prices charged by Telecom.

*(iii) Access pricing*

This litigated case<sup>2</sup> arose in the telecommunications industry. It concerned high-speed data transmission services, wholesale access to 'data tails'<sup>3</sup> and backbone transmission services, centred on the price for data tails. The Commission concluded that Telecom Corporation of New Zealand Ltd had used its dominant position and substantial market power to price data tails to downstream competitors at a level that contravened the Efficient Component Pricing Rule<sup>4</sup> (ECPR), and that it did so for an anti-competitive purpose. The Commission considered that Telecom's wholesale prices for the data tails exceeded the price of an "end-to-

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<sup>2</sup> *Commerce Commission v Telecom Corporation of New Zealand Ltd and Telecom New Zealand Ltd* (High Court, Auckland, 9 October 2009).

<sup>3</sup> Data 'tails' are parts of the connection to a customer that Telecom's competitors must acquire from Telecom where the competitor's network does not reach the customer. They are required for high-speed data transmission services that allow businesses to transmit information in digital form between sites across established private networks or to other businesses.

<sup>4</sup> The nature of this rule is explained in the response to question 14 below.

end” data service and the price that Telecom charged itself for the use of the tails. The Commission took the case to the High Court, which found in October 2009 that Telecom had used its dominant position/market power for a proscribed purpose. The High Court confirmed that ECPR was the appropriate economic model to apply in access cases under s 36 of the Commerce Act. At the time of writing, the Court has yet to consider the details of relief sought, including the quantum of any pecuniary penalty. It is not known at this time whether Telecom will appeal. The High Court’s judgment is unreported, but the Commission’s media release is available at the following link: [www.comcom.govt.nz](http://www.comcom.govt.nz) under ‘Media Centre’.

New Zealand’s competition law is subject to a judicial system. Criminal sanctions do not apply to breaches of competition law in New Zealand. Consequently, where Court action is undertaken, civil penalties are sought. In the past ten years two cases involving unconditional or constructive refusals to deal have been taken to Court by the Commission. These are the Bay of Plenty Electricity case outlined in (i) above, and the Telecom (data tails) case discussed in (iii) above.

Two leading cases on the use of s 36 of the Commerce Act are the following:

*Telecom v Clear Communications*<sup>5</sup>. When asked to rule on what was an appropriate test for access to an incumbent network, the Privy Council<sup>6</sup> noted that the Commerce Act “provided no explanation” as to the distinction between lawful and unlawful conduct. The judgment adopted a ‘counterfactual test’ (explained in next section below) to assess the connection between market behaviour and the allegedly restrictive behaviour. The Privy Council held that the only correct economic standard to test whether pricing by an incumbent of an essential input will preclude competition to the detriment of consumers is the Baumol-Willig rule. (This is more usually known as the Efficient Component Pricing Rule ‘ECPR’.) The appropriateness of ECPR was confirmed by the High Court in the recent Telecom data tails case referred to above.

*Carter Holt Harvey v Commerce Commission*<sup>7</sup>. In this case, the Privy Council reiterated that the counterfactual test was the only way to differentiate anti-competitive behaviour compared to a vigorous competitive response from an incumbent. The Privy Council held that it followed that a firm could not be using its dominant position if it was acting as a non-dominant firm otherwise in the same position would have acted in a competitive market. The relevant quote is as follows:

“In approaching the issue of whether s 36 had been breached it was therefore necessary to consider how the hypothetical seller would have acted in a competitive market (the counterfactual test). The test asked whether a hypothetical firm not in a dominant position but otherwise similarly placed could rationally have acted as the dominant firm did.”

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<sup>5</sup> *Telecom Corporation of New Zealand Ltd v Clear Communications Ltd* [1995] 1 NZLR 385 (Judicial Committee of the Privy Council, 19 October 1994).

<sup>6</sup> Until 1 January 2004, New Zealand’s court of final appeal was the Judicial Committee of the Privy Council in London. From that date New Zealand’s highest court became the newly created Supreme Court of New Zealand.

<sup>7</sup> *Carter Holt Harvey Building Products Group Ltd v Commerce Commission* [2006] 1NZLR 145.

The Commission considers that the counterfactual test laid down by the Privy Council can cause difficulties in analysing conduct under s 36. On 30 October 2009 the Supreme Court (which had replaced the Privy Council as New Zealand's highest judicial authority) granted leave to the Commission to appeal the judgement of the Court of Appeal in the *Telecom 0867*<sup>8</sup> case. The Commission will ask the Supreme Court to reconsider the counterfactual test and whether it is necessary or appropriate in all s 36 cases.

**7. *Does your jurisdiction allow private parties to challenge a refusal to deal in court? If yes, please provide a short description of representative examples of these cases. If known, indicate the number (or an estimate) of private cases.***

Yes, private parties may challenge a refusal to deal in court. Such parties may seek relief in the form of injunctions and the award of damages for loss or damage resulting from conduct in breach of s 36.

The Commission has limited knowledge on many of the private actions taken under the Commerce Act. One commentator<sup>9</sup> identified over thirty private action cases taken under s 36 in the New Zealand courts in the period 1986—2006. A number of these cases were unreported, and no analysis is available of how many cases related to refusals to deal. A summary of two significant private cases involving refusals to deal follows.

(a) *Union Shipping NZ Ltd v Port Nelson Ltd* (1990). Union Shipping challenged the access terms imposed upon it as a competing stevedore by the incumbent port company. The court concluded that a serious issue had been raised and ordered a cost accounting inquiry as a precursor to any further relief. Following that inquiry the parties are believed to have resolved the matter.

(b) *Chatham Islands Fishermen's Coop Co Ltd v Chathams Islands Packing Co Ltd* (1988). The Fishermen's Coop Co alleged that the Packing Co was excluding them from using the only practicable wharf available. While the court did not issue an interim injunction, it decided there was a serious issue to be tried under section 36 of the Commerce Act. The parties subsequently resolved the issues through negotiation.

## EVALUATION OF AN ACTUAL REFUSAL TO DEAL

**8. *What are your jurisdiction's criteria for evaluating the legality of refusals to deal? You may wish to address the following points in your response.***

- a. *What are the competitive concerns regarding a refusal to deal? Must the practice exclude or threaten to exclude a rival (or rivals) from the market, or all rivals? If only threatened exclusion is required, how is it determined? If neither actual nor threatened exclusion is required, what other harms are considered?***

<sup>8</sup> In August 2009 the Court of Appeal found that Telecom Corporation of New Zealand Ltd had not breached section 36 of the Commerce Act through the introduction of a dial-up prefix in 1999.

<sup>9</sup> Rex J Ahdar, "Escaping New Zealand's monopolisation quagmire" (2006) 34 Australian Business Law Review, pages 260-283.

The competitive concern is that a firm with substantial market power may be taking advantage of its market position to restrict another firm from entering a market, preventing or deterring a firm from engaging in competitive conduct, or eliminating a firm from a market. The statutory prohibition may apply even where the purpose of the dominant firm is to exclude a single market participant. Before deciding a breach had occurred, the courts would need to be satisfied that all elements of s 36 were present, including a restrictive purpose, regardless of whether there was a threatened exclusion or an actual exclusion.

***b. Must consumer harm be demonstrated? Must the harm be actual or may it be just likely, potential, or some other degree of proof?***

While likely or actual consumer harm or other anti-competitive effect caused by a refusal to deal is not specifically identified as a prerequisite for finding a breach of s 36 of the Commerce Act, it is a significant factor in the Commission's Enforcement Criteria as to what action should be taken on alleged breaches of the Commerce Act. Consumer harm or anti-competitive effect may also be relevant in determining whether the requirement of an anti-competitive purpose can be inferred from the circumstances. Also, the extent of consumer harm is likely to impact on the level of any penalties imposed by the New Zealand courts.

***c. Does intent play a role, and if so what role and how is it demonstrated?***

Intent is a factor in a potential breach. That is, the purpose of the person refusing to deal is relevant to any enforcement action and must be proved by the Commission before a breach can be made out. New Zealand courts generally have indicated that the relevant purpose needs to be evaluated objectively although the courts also will consider subjective evidence of purpose where that can be shown. The approach to purpose can involve subjective and/or objective considerations:

- 'subjective', meaning direct evidence that an anti-competitive outcome was a real and substantial purpose of one or more of the parties, which can include direct evidence from parties' written and oral statements contemporaneous to the conduct; and
- 'objective', meaning an anti-competitive purpose can be inferred from objective facts, such as actions and circumstances; relevant situations include those in which it is obvious on the face of the agreement and in which an anti-competitive purpose can be inferred from a likely or actual anti-competitive effect.

***d. Are refusals to deal evaluated differently if the dominant firm has had a course of dealing with firms that are not rivals or potential rivals? Thus, if a firm sells its product to everyone except its main rival, is that relevant to whether the refusal is unlawful?***

The relevant test applied in New Zealand is whether the refusal to deal would amount to an attempt to exclude another market participant where the firm has a substantial degree of market power and has taken advantage of that position for a restrictive purpose. Recent case law emphasizes the importance of a counterfactual test applied to the facts of a situation, viz,

would a person in a competitive market have acted in the same manner. If a firm was to refuse to deal where market power was absent, or in a competitive market situation, no issue would arise under s 36.

A refusal to deal with a rival, but at the same time dealing with other non-rival firms having similar characteristics, is not specifically addressed in the Commerce Act. A refusal to deal where a dominant firm has had a course of dealing with firms that are not rivals or potential rivals, would be tested in terms of the purpose of its behaviour. Under current New Zealand case law, a counterfactual test would be applied to assess whether this was lawful or unlawful conduct., viz, a firm could not be using its dominant position if it was acting as a non-dominant firm otherwise in the same position would have acted in a competitive market. If the relevant behaviour by the firm with substantial market power was aimed at excluding another firm it would be at risk of breaching section 36.

- e. Are refusals to deal evaluated differently if there is a history of dealing between the parties? Is a prior course of dealing between the parties a requirement for finding liability?*

Refusals to deal are not treated any differently if there is a history of dealing between the parties. A prior course of dealing between the parties is not a requirement for finding liability, but it might be relevant to establishing that dealings between the parties are feasible.

- 9. Does your jurisdiction recognize a distinct offense of refusing to provide access to “essential facilities”? Your response need not include any offenses that arise from sector-specific regulatory provisions rather than the competition laws.**

*If so, how does your jurisdiction define “essential facilities”? Under what conditions has a refusal to deal involving an “essential facility” been found unlawful? Please provide examples and the factors that led to the finding.*

The concept of an essential facility is not recognised under New Zealand competition law. The relevant tests in New Zealand are those provided in s 36 of the Commerce Act, i.e. does the firm have market power; and has it taken advantage of its market position for a prohibited anti-competitive purpose? Recent New Zealand case law has applied a counterfactual test, (viz, would a person without market power have acted in a similar manner?) to assess whether market power has been employed restrictively.

Courts have, in applying s 36, found a duty on a dominant firm to supply essential inputs to downstream competitors where they are in a position to do so. This was the case in the recent *Telecom* data tails and *Telecom v Clear* cases referred to above.

- 10. Does the analysis differ if the refusal involves intellectual property? If so, please explain.**

- a. Does the type of intellectual property change the analysis (e.g., patents versus trade secrets)?*

The Commission has seldom been required to analyse competition issues in relation to intellectual property rights, and there is very little relevant case law on this subject. However, the Commerce Act does not distinguish different types of intellectual property.

Section 45 of the Commerce Act provides an exemption from the prohibitions elsewhere in the Commerce Act for contracts, arrangements and understandings which relate to the existence of a statutory intellectual property right. Section 36(3) of the Commerce Act states that a person does not take advantage of a substantial degree of power in a market by reason only that the person seeks to enforce a statutory intellectual right.

There could be competition concerns if the holder of intellectual property rights that gave the holder market power in one market attempted to leverage those rights so as to gain market power in another market.

***b. Can a refusal to provide interface information to make a product interoperable constitute a refusal to deal?***

Neither the Commission nor the New Zealand courts have addressed the issue of whether a refusal to provide interface information to make a product interoperable might constitute a refusal to deal. A refusal to provide interface information to make a product interoperable might well be at risk under the Commerce Act.

***11. Does the analysis change if the refusal occurs in a regulated industry? If so, please explain.***

Section 36, and the other provisions of Part 2 of the Commerce Act, may apply to a refusal to deal, regardless of whether or not the refusal occurs in a regulated industry so long as the relevant terms of access are not mandated by the regulatory regime.

***12. Does the analysis change if the refusal is made by a former state-created monopoly? If so, please explain.***

The analysis does not change if the refusal is made by a former state-created monopoly. A significant number of the cases investigated by the Commission that related to refusal to supply (particularly access terms) have involved current or former state monopolies.

## **EVALUATION OF CONSTRUCTIVE REFUSALS TO DEAL**

***13. Does your jurisdiction recognize the concept of a “constructive” refusal to deal? If so, does it differ from the definition in the introductory paragraphs above? When determining whether the terms of dealing constitute a constructive refusal to deal, how does your jurisdiction evaluate such questions as whether the price is sufficiently high or whether the quality has been sufficiently degraded so as to constitute a constructive refusal?***

In effect, the Commerce Act would recognize the concept of a “constructive” refusal to deal although it is not specifically provided for. The tests applied to an actual refusal deal also are likely to apply to a “constructive” refusal. As discussed in question 6 above, in *Telecom v Clear Communications*, the Privy Council adopted a counterfactual test to assess the connection between market power and the allegedly restrictive behaviour. The Privy Council also held that the test as to whether pricing by an incumbent of an essential input will preclude competition to the detriment of consumers is the Baumol-Willig rule, more usually known as the Efficient Component Pricing Rule (ECPR).

## EVALUATION OF “MARGIN SQUEEZE”

**14. Does your jurisdiction recognize a concept of (or like) margin squeeze? If so, under what circumstances and what criteria are applied to determine whether the margin squeeze violates your law?**

*You may wish to address the following sorts of issues: the effect the margin squeeze must have on the downstream market to be a violation; must the firm be dominant in both the upstream and downstream markets, or only the upstream market; how, if at all, the criteria are different from determining whether a firm is engaging in predatory pricing; any cost benchmarks used to determine if a margin squeeze exists; how your jurisdiction would treat a temporary margin squeeze; how, if at all, your jurisdiction’s analysis of margin squeeze differs from its analysis of a traditional refusal to deal; do the criteria change depending on whether the margin squeeze occurs in a regulated industry or in an industry in which there is a duty to deal imposed by a law other than the jurisdiction’s competition laws?*

While not specifically mentioned in the Commerce Act, an anti-competitive margin squeeze is likely to fall within the prohibition in s 36. This conduct is often described as ‘access pricing’ in New Zealand.

Typically, for access pricing to breach s 36, the following conditions must be met:

- there must be upstream market power;
- the access pricing must be inconsistent with the Efficient Component Pricing Rule (ECPR);
- the breaches of ECPR must be more than *de minimis*; and
- the firm must have had an anti-competitive purpose to exclude a competitor from a downstream market.

The ECPR is a form of retail minus access pricing regime. Essentially the ECPR tests whether the margin between the access price and the final price charged to the incumbent’s own customers in the downstream market is sufficient to allow an efficient competitor to compete. It encourages productively efficient entry.

The ECPR can be expressed as follows:

Component price = Final product price – costs avoided by the incumbent as a result of the incumbent not providing the product/service that transforms the component into the final product + any costs in providing access to a competitor; or

Component price = Incumbent’s direct average incremental cost of providing the component + the incumbent’s opportunity cost of the sale of input.

In the latter formulation, the rationale for recovering that opportunity cost is that it is the contribution towards the common fixed costs of the network. It is normal for a firm to price some or all of its products to cover not only the cost of the product but also to make some contribution to the common fixed costs that do not enter the incremental costs of the individual products. If the ECPR is applied correctly, the incumbent should be indifferent as to whether it or its competitor supplies the component in question.

When assessing a temporary margin squeeze, the purpose of the behaviour would be focussed upon. If the margin squeeze was incapable of having the *effect* of excluding a rival due to its abbreviated nature, this would be a relevant consideration in assessing whether the conduct could be said to have the *purpose* of excluding a rival.

In response to the specific questions asked, for analysis under s 36 of the Commerce Act:

- The same tests apply whether the issue involves a regulated or a non-regulated industry.
- Recoupment need not be proved.

## **PRESUMPTIONS AND SAFE HARBORS**

***15. Are there circumstances under which the refusal to deal (or any specific type) is presumed illegal? If yes, please explain, including whether the presumption is rebuttable and, if so, what must be shown to rebut the presumption.***

In terms of s 36 of the Commerce Act, there are no circumstances in which refusal to supply by a firm with a substantial degree of market power is presumed illegal.

***16. Are there any circumstances under which there is a safe harbor for a refusal to deal (or any specific type)? Are there any circumstances under which there is a presumption of legality? Please explain the terms of any presumptions or safe harbors.***

No safe harbours are provided.

## **JUSTIFICATIONS AND DEFENSES**

***17. What justifications or defenses are permitted for a refusal to deal? Are there any particular justifications or defenses for specific types of refusal? Please specify the types of justifications and defenses that your agency considers in the evaluation of a refusal to deal, the role they play in the competitive analysis, and who bears the burden of proof.***

Case law under the Commerce Act tests whether a party with a substantial degree of market power has acted restrictively by asking if an equivalent party in a competitive market might have acted similarly (the counterfactual test). Case law also recognizes that a firm with a substantial degree of market power is entitled to compete vigorously. Depending on the circumstances, factors that may be taken into account in assessing whether it is appropriate to

refuse to deal could include situations where it is not feasible (such as where the firm had no capacity to supply), where the firm already has an adequate distribution network, or where the prospective purchaser had a poor credit record.

### *Remedies*

**18. What remedies for refusals to deal were applied in the cases discussed in questions 6 and 7? If one available remedy is providing mandated access/rights to purchase, how is the price established for the sale/license of the good or service? How are other terms of the transaction determined?**

(a) Enforcement action by the Commission

Remedies such as those noted in the second sentence of the question are not available in New Zealand. If such actions were required, they would more appropriately be introduced under regulations.

The Commission concluded that enforcement action was not appropriate following 28 of the 32 full investigations referred to in question 5 above. The other four investigations led to the issue of a cease and desist order in one case, a formal warning in another and to litigation in the High Court in two cases. The Commission was successful in one of the two litigated cases, but not in the other. In the litigated case where the Court found that s 36 had been breached, a pecuniary penalty appears likely.

(b) Private action

The outcomes of two private cases are outlined in response to Question 7 above. Remedies for private actions are limited to injunctions and damages.

***19. If the unlawful refusal to deal arose in a regulated industry, was the remedy available because of the regulatory provisions applicable to the defendant or is the remedy one that could be used for any (non-regulated industry) unlawful refusal to deal?***

The remedies available to the Commission for conduct that constitutes an unlawful refusal to deal do not depend on whether or not the firm involved is in a regulated industry. The tests in s 36 of the Commerce Act are the same in both cases.

Specific regulation is provided for the telecommunications and dairy sectors, respectively, with the Commission having responsibility to enforce both the Telecommunications Act 2001 and the Dairy Industry Restructuring Act 2001. Specific provisions exist in the Telecommunications Act that regulate access to the incumbent telecommunications network provider, while the Dairy Industry Restructuring Act includes provisions that regulate access to raw milk from the major dairy cooperative. The Commission's role under these two acts includes both making determinations in respect of access disputes, and investigating complaints of anti-competitive conduct.

***20. Has your agency considered using any other remedies in refusal to deal cases that are available under your jurisdiction's competition laws and that were not described in your response to Question 18? Did the availability or administrability of a remedy influence the decision whether or how to bring a refusal to deal case? If so, please explain your response.***

The only remedy available to the Commission, other than those noted in response to Question 18 above, would be to negotiate an administrative settlement. This procedure, which is voluntary on the part of the company concerned, is a formal agreement between the Commission and the company about specific elements of the company's future conduct. This remedy has been used on occasions for some other types of anti-competitive conduct, but did not seem appropriate for the four cases noted in 18 (a) above.

## **POLICY**

***21. What policy considerations does your jurisdiction take into account with respect to a refusal to deal? Do they apply to all forms of refusal? Are there any particular considerations for specific types of a refusal to deal? What importance does your jurisdiction's policy place on incentives for innovation and investment in evaluating the legality of refusals to deal?***

Any Commission decision to take action against a refusal to deal would be evaluated against the Commission's enforcement criteria. These criteria include the extent of detriment from the behaviour, the level of seriousness of the conduct and whether public interest considerations might arise.

The approach to refusals to deal under New Zealand competition law seeks to protect incentives to invest and innovate. We recognize that there can be a conflict between these incentives and static efficiency concerns.

For example, ECPR is the method approved by the courts for assessing a margin squeeze. The intention behind this model is to promote productively efficient entry – allocative efficiency is not addressed. There is, however, some flexibility in deciding how to approach the level of the 'access discount' an access seeker obtains from the incumbent's final product price. The discount is typically based in large part on level of costs avoided by the incumbent as a result of the incumbent not providing the product/service that transforms the component into the final product. In assessing avoidable costs, there are important decisions to be made, for example, relating to the relevant time-frame over which costs are assessed as avoidable or not. This will be informed in part by the relevant policy considerations underlying the law and considering the relevant short- and long-term effects of the conduct. The decision will ultimately be for the Courts.

The Commission may also have regard to the effect of the conduct on static efficiency and incentives to invest and innovate in any decision to take enforcement action against a refusal to deal.

**22. Please provide any additional comments that you would like to make on your experience with refusals to deal in your jurisdiction. This may include, but is not limited to, whether there have been – or whether you expect there to be – major developments or significant changes in the criteria by which you assess refusal to deal cases.**

In addition to the cases that were fully investigated, the Commission received numerous allegations of unconditional or constructive refusals to deal where a preliminary examination did not reveal a *prima facie* breach. The persons making these allegations were informed of the Commission's view and were told that no further action would be taken.

The cases of alleged unconditional or constructive refusals to deal that have been subject to full investigation by the Commission have involved a range of types of conduct. These cases constitute a significant portion of the Commission's investigations into conduct that might breach the prohibition in s 36 of the Commerce Act of taking advantage of a substantial degree of market power for anticompetitive purposes.

The Commission has found difficulty in undertaking litigation under section 36. Identifying, to the satisfaction of the High Court, the boundary between vigorous but legitimate conduct by a firm with a substantial degree of market power, and conduct that breaches the prohibition against unilateral use of market power for anti-competitive purposes, presents a considerable challenge.

At present no guidelines have been issued on the Commission's approach to the analysis of allegations that s 36 of the Commerce Act has been breached. As noted above, with the objective of increasing certainty and transparency, the Commission has commenced the preparation of guidelines that will deal separately with several categories of unilateral conduct, including refusals to deal.